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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 210

THE WILBER NATIONAL BANK OF ONEONTA, NEW YORK, as Administrator of the Estate of James Patrick Mahar, Deceased, petitioner

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is contained in the record (R. 88–92). The opinion of the Circuit Court of Appeals is reported in 69 F. (2d) 526 (R. 179–182).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1934 (R. 182). The petition for writ of certiorari was filed July 21, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

May any officer or agent of the United States by his conduct waive, or estop the United States to deny, compliance by a holder of a Government life-insurance policy with duly authorized Regulations of the Veterans' Bureau and provisions of the policy governing lapse of such insurance for non-payment of premium on time and reinstatement thereafter?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 13–21.

STATEMENT

This suit was instituted in the District Court for the Northern District of New York on April 17, 1930, by the petitioner herein as administrator of the estate of James Patrick Mahar, deceased, seeking to recover benefits under a contract of United States Government life insurance issued to the plaintiff's decedent, hereinafter called the veteran. Judgment for the plaintiff was reversed by the Circuit Court of Appeals for the Second Circuit and the plaintiff now seeks a writ of certiorari.

In its petition filed in the District Court the plaintiff alleged that the veteran was issued a policy of war-risk insurance while in the Army during the World War and after his discharge al-

lowed it to lapse. That on or before July 1, 1927, he applied for reinstatement of a portion of the insurance and on September 19, 1927, a Government life-insurance policy in the sum of $5,000 was issued to him effective July 1, 1927. That the premium on a monthly basis was $3.95. That at the time of his application he paid the sum of $13.90 and received from the Government a receipt for that amount "in full payment of insurance premium due * * * from July 1, 1927 to October 1st, 1927." That all subsequent premiums were paid as they became due. That the veteran became permanently and totally disabled in September 1927, from a diseased growth involving the gall bladder, as the result of which he died December 24, 1927. That the plaintiff was duly issued letters of administration and has made due and timely proof to the defendant of the veteran's disability and death. It was further alleged that the defendant disagreed with the plaintiff as to its claim and refused to pay the same (R. 3–8).

The answer admitted the military service of the veteran, the issuance of war-risk term insurance during such service and the existence of a disagreement as to the plaintiff's claim. All other allegations in the petition were denied (R. 10–12).

The case was tried before a jury. At the close of the plaintiff's case the defendant moved for nonsuit on the ground that the plaintiff had failed to

prove the insurance policy matured by permanent and total disability or death prior to lapse (R. 78). This motion was denied with permission to renew it (R. 79). At the close of all the evidence the plaintiff moved for a directed verdict for the full amount of the policy and the defendant renewed its motion for non-suit. The motion was denied, an exception allowed and defendant thereupon moved for a directed verdict. The court then withdrew the case from the consideration of the jury (R. 87) and later delivered an opinion holding that the defendant was liable on the ground of estoppel (R. 88–92). The defendant thereupon tendered proposed findings of fact and conclusions of law. Some were approved and others refused (R. 98–101). The trial judge then made findings and conclusions of his own (R. 92–97) and entered judgment for the plaintiff accordingly (R. 106–108). To some of these findings exceptions were filed on behalf of the defendant (R. 102–104) and plaintiff (R. 105), respectively.

Upon an appeal duly perfected by the defendant (R. 108–117, 177–178) the judgment was reversed. The Circuit Court of Appeals for the Second Circuit held that by the terms of the policy and regulations the veteran's insurance lapsed prior to its alleged maturity for non-payment of the premium due September 1, 1927; and that no conduct on the part of the Veterans' Bureau or any other governmental agency could constitute a waiver of the

regulations and policy provisions or estop the Government to invoke them.

The uncontradicted evidence showed the following facts:

The veteran during military service had obtained a $10,000 contract of war-risk term insurance which lapsed for non-payment of premium due August 1, 1919 (R. 145). On July 1, 1927 he submitted an application to reinstate $5,000 of this insurance and convert it to Government life insurance. He tendered in payment of premiums the sum of $13.90 proposing that it be allocated as follows (R. 158):

Premiums Tendered With Application:	
(*a*) For first month of lapse	$6.70
(*b*) For month of July '27, reinstatement of Term Insurance	3.35
(*c*) Advance premium on Term Insurance $5,000	3.85
(*d*) For first payment on ($5,000 deleted) Government (converted) insurance ($3.85 deleted)	
Total	13.90

The proposed allocation was in error. As the veteran was seeking to reinstate only half of the insurance originally held by him he was required to pay only half of the premium covering the first month of lapse. He apparently assumed that the full premium was due (R. 145–146). Moreover, the amounts designated to cover the July and August premiums on the converted policy were insufficient by the sum of 70¢. Correctly applied the sum tendered was sufficient to pay for the reinstatement and premiums on the converted policy for the

months of July and August leaving a balance to the veteran's credit of $2.65. The sum was so applied by the Veterans' Bureau. (Plaintiff's Exhibit 7—R. 145-147.)

Receipt of the remittance of $13.90 was acknowledged by a "provisional receipt" warning the veteran that the insurance applied for was to be effective provided reinstatement of the previous term insurance be approved by the Bureau, the proper amount be tendered to cover the premium, and the application determined to be acceptable to the Bureau. (Plaintiff's Exhibit 3—R. 136.)

Sometime shortly after the middle of September 1927 the veteran received a five-year convertible term policy of United States Government life insurance which showed on its face that it was issued September 19, 1927, effective July 1, 1927. (Plaintiff's Exhibit 1—R. 120.) It contained provisions to the effect that the monthly premium was $3.95 (thus indicating to the veteran the mistake made by him in his proposed allocation with reference to the amounts of premiums payable for the months of July and August (R. 118), and that unless this should be paid on the first of each month or within the grace period of thirty-one days the policy would become void and subject to reinstatement only upon evidence of insurability "satisfactory to the director of the United States Veterans' Bureau, and upon the payment of all premiums in arrears,

with interest * * *" (R. 121). The veteran, however, allowed his insurance to lapse for nonpayment of the premium due September 1st, made no inquiries of the Veterans' Bureau with reference to his insurance, and made no further remittances until November 2, after he had become ill. At that time his wife, under his direction, forwarded the sum of $3.95 (R. 22, 37) and on December 4 a similar remittance was made (R. 23, 38). Neither remittance was accompanied by an application for reinstatement or any notice of the fact that his condition had changed and that he was then in poor health. The trial court found that the veteran became totally and permanently disabled on October 17, 1927, and that he died December 24, 1927 (R. 94). In January 1928, still in ignorance of his illness and death, the Veterans' Bureau addressed a letter to him acknowledging receipt of a remittance of $3.95 tendered in payment of the September premium and advising that as it had not been sent until after the expiration of the grace period it could not be accepted in payment of the premium until the insurance had been reinstated. A form of application for reinstatement and directions concerning the same were also enclosed, together with a statement showing the amount already received and the balance due to carry his insurance through the month of January 1928 (R. 28, 140–143).

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ARGUMENT

It is indisputable and seems to be conceded that under the terms of the veteran's policy of insurance and the Regulations of the Veterans' Bureau his insurance expired October 2, 1927, for failure to pay the premium due September 1 within the grace period of thirty-one days. (*Infra* pp. 19–20, R. 120–121.) No effort was made to reinstate the policy, and even if reinstatement had been sought after October 2 the state of the veteran's health would have precluded compliance with the conditions of the policy in that regard.

The petitioner, however, contends that the Government is estopped to invoke or has waived these provisions of the policy and Regulations by the failure of the Veterans' Bureau to notify the veteran in advance of the date when the September premium was due or to warn him thereafter that his policy had lapsed. It is claimed that the amounts tendered in November and December were sufficient to cover the premiums for the months of September and October; that in October the veteran became permanently and totally disabled, thereby maturing the policy, making disability benefits payable and relieving the insured from the necessity of making further payments; and that the Government is estopped to assert that the insurance was not in force on the date of alleged maturity.

The Government on the other hand contends that this Court has clearly indicated in its opinion

in *United States* v. *Worley*, 281 U.S. 339, that the ground upon which the petitioner bases his claim is untenable. What is there said of the Government's position as to yearly renewable term insurance provided in the Act of October 6, 1917 (40 Stat. 398), as distinguished from that assumed by it in undertaking marine insurance, is equally applicable to its position in issuing and administering Government life insurance. Referring to the statutory provisions for marine insurance it is said in the opinion (pp. 342–343):

> There was nothing in the statute to disclose an intention on the part of the United States to bear any part of the cost of the insurance or to give pecuniary aid to the owners of vessels or other property insured. And as a matter of fact a large profit resulted from the operation of the business. Annual Report of the Director of the U.S. Veterans' Bureau, 1923, p. 675.
>
> On the other hand, the Act of October 6, 1917, discloses a purpose on the part of the United States to protect those engaged in war service and their dependents and to contribute to their financial welfare. * * * The United States bore expenses of administration and excess mortality and disability cost resulting from the hazards of war. The insurance was limited to $10,000 and was made payable in 240 equal monthly installments; it was made not assignable nor subject to claims of creditors of the in-

> sured or of the beneficiary. The premiums were not adequate. The Congress intended that the United States should bear, and undoubtedly it has borne, a large part of the cost. Consequently the payments include both insurance and pension. *White* v. *United States,* 270 U.S. 175, 180.

The United States has undertaken to contribute heavily to the Government Life Insurance Fund and takes nothing in return. The petitioner attempts to dismiss the cost to the Government of administering the Fund as "a mere trifle" (Pet. Br. 16) but later directs attention to the fact that in 1933 more than half a million policies were in force amounting to well over two billion dollars in the aggregate, and that of late, at least, the number has been increasing every year (Pet. Br. 17). It is indeed difficult to understand how the cost of handling so vast an enterprise could be unsubstantial.

By far the greatest potential burden undertaken by the Government in this case, however, is the liability incurred for all benefits payable on account of death or disability from disease or injury "traceable to the extra hazard of the military or naval service." (Section 301, *infra,* p. 15.) None of this is paid from the Fund. Veterans who had maintained their yearly renewable term policies and those who were partially disabled from injury or disease suffered during the World War and had

reinstated their term insurance were eligible for Government life insurance without medical examination. (Sections 301, 304, *infra*, pp. 15, 16.) Moreover, all members of the military, naval, and reserve forces and of the Coast Guard are also eligible and many have obtained this insurance. It is only fair to assume that benefits for the deaths or disabilities of a substantial number of these policy holders are traceable to the extra hazards of military or naval service and hence are payable by the Government and not by the Fund. Thus, it is plain that far from stepping out of its capacity as a sovereign dispensing rewards for service, the United States has undertaken to contribute heavily to the financial welfare of the holders of Government life insurance. Its position in that respect is clearly distinguishable from the one occupied by it while engaging in marine insurance. The profits from that insurance were retained by the Government. All profits derived from Government life insurance belong to the policy holders. The Government gives much and takes nothing. Under the circumstances it cannot be assumed that the Government consented to waive its right as a sovereign to be exempted from estoppel by the omissions of its officers or agents. *Lee* v. *Munroe,* 7 Cranch 366, 369; *Hart* v. *United States,* 95 U.S. 316, 318; *Birmingham* v. *United States,* 4 F. (2d) 508 (C.C.A. 8th); *Crawford* v. *United States,* 40 F. (2d) 199 (C.C.A. 2d); *Raives* v. *Raives,* 54 F. (2d) 267

(C.C.A. 2d); *Jackson* v. *United States*, 24 F. (2d) 981 (D.C. Kans.), 34 F. (2d) 241 (C.C.A. 10th), 281 U.S. 344; *United States* v. *Loveland*, 25 F. (2d) 447 (C.C.A. 3rd) (error confessed for failure to file a written waiver of jury trial, 278 U.S. 665).

CONCLUSION

For the reasons stated we submit that the petition for certiorari should be denied.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

WILL G. BEARDSLEE,
Director, Bureau of War Risk Litigation.

FENDALL MARBURY,
Special Assistant to the Attorney General.

SEPTEMBER 1934.

APPENDIX

Pertinent Statutes and Regulations

The World War Veterans Act, of 1924, as amended prior to July 1, 1927, the effective date of the policy in this case, provides in part as follows:

> Sec. 5. The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, * * *. (June 7, 1924, c. 320, 43 Stat. 608.)
>
> Sec. 17. That all premiums paid on account of insurance converted under the provisions of Title III hereof shall be deposited and covered into the Treasury to the credit of the United States Government life insurance fund and shall be available for the payment of losses, dividends, refunds, and other benefits provided for under such insurance, including such liabilities as shall have been or shall hereafter be reduced to judgment in a district court of the United States or in the Supreme Court of the District of Columbia. Payments from this fund shall be made upon and in accordance with awards by the director.
>
> The bureau is authorized to set aside out of the fund so collected such reserve funds as may be required, under accepted actuarial

principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest the said United States Government life insurance fund, or any part thereof, in interest-bearing oblibations of the United States or bonds of the Federal farm-loan banks and to sell said obligations of the United States or the bonds of the Federal farm-loan banks for the purposes of such fund (June 7, 1924, c. 320, 43 Stat. 612).

SEC. 28. There shall be no recovery of payments from any beneficiary who, in the judgment of the director, is without fault on his part, and where, in the judgment of the director, such recovery would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience.

When under the provisions of this section the recovery of a payment made from the United States Government life insurance fund is waived, the United States Government life insurance fund shall be reimbursed for the amount involved from the current appropriation for military and naval insurance (July 2, 1926, c. 723, sec. 4, 44 Stat. 792).

SEC. 300. In order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department protection for themselves and their dependents, the United States, upon application to the bureau and without medical examination, shall grant United States Government life insurance (converted insurance) against the death or total permanent disability of any such person in any

multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided. * * *

The United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at 3½ per centum per annum. * * * (March 4, 1925, c. 553, sec. 12, 43 Stat. 1308.)

SEC. 301. Except as provided in the second paragraph of this section, not later than July 2, 1927, all term yearly renewable insurance held by persons who were in the military service after April 6, 1917, shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium term, and into other usual forms of insurance, and for reconversion of any such policies to a higher premium rate in accordance with regulations to be issued by the director, and *shall prescribe the time and method of payment of the premiums thereon,* but payments of premiums in advance shall not be required for periods of more than one month each, and may be deducted from the pay or deposit of the insured or be otherwise made at his election. * * * (Italics ours.) (June 2, 1926, c. 449, 44 Stat. 686.)

SEC. 302. Whenever benefits under United States Government life insurance (converted insurance) become, or have become, payable because of total permanent disabil-

ity of the insured or because of the death of the insured as a result of disease or injury *traceable to the extra hazard of the military or naval service,* as such hazard may be determined by the director, *the liability shall be borne by the United States,* and the director is hereby authorized and directed to transfer from the military and naval insurance appropriation to the United States Government life-insurance fund a sum which, together with the reserve of the policy at the time of maturity by total permanent disability or death, will equal the then value of such benefits. * * * (June 7, 1924, c. 320, 43 Stat. 625.) (Italics ours.)

SEC. 304. In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with an application for reinstatement, in whole or in part, of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) hereafter made may be approved if made within one year after the passage of this amendatory Act or within two years after the date of lapse or cancellation: *Provided,* That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further,* That the applicant during his lifetime submits proof satisfactory to the director showing that he is not totally and permanently disabled. As a condition, however, to the acceptance of an application for the reinstatement of lapsed or canceled yearly renewable term insurance, where the requirements as to the physical condition of

the applicant have not been complied with, or, for the reinstatement of the United States Government life insurance (converted insurance), the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not lapsed, together with interest at the rate of 5 per centum per annum, compounded annually, on each premium from the date said premium is due by the terms of the policy: *Provided further,* That where within one year of this amendatory Act all of the requirements for reinstatement of yearly renewable term insurance under this section are complied with, except the payment of unpaid premiums with interest, and proof satisfactory to the director is furnished showing the applicant is unable to pay such premiums with interest or some part thereof, the application may be approved, and the amount of unpaid premiums with interest as provided in this section shall be placed as an interest-bearing indebtedness against the insurance, such indebtedness to bear interest at the rate of 5 per centum per annum, compounded annually, to be deducted in any settlement thereunder: *And provided further,* That no yearly renewable term insurance shall be reinstated after July 2, 1927. (July 2, 1926, c. 723, sec. 15, 44 Stat. 799.)

SEC. 306. The bureau is authorized to make provisions in accordance with regulations, whereby the payment of premiums on yearly renewable term insurance and United States Government life insurance (converted insurance) on the due date thereof may be waived and the insurance may be deemed not to lapse in the cases of the following persons, to wit: (a) Those who are

confined in hospital under said bureau for a compensable disability during the period while they are so confined; (b) those who are rated as temporarily totally disabled by reason of any injury or disease entitling them to compensation during the period of such total disability and while they are so rated; (c) those who, while mentally incompetent and for whom no legal guardian had been or has been appointed, allowed or may allow their insurance to lapse while such rating is effective during the period for which they have been or hereafter may be so rated, or until a guardian has notified the bureau of his qualification, but not later than six months after appointment as guardian, the waiver in such cases to be made without application and retroactive when necessary: * * * *And provided further,* That in the event any lien or other indebtedness established by this act exists against any policy of converted insurance in excess of the then cash surrender value thereof at the time of the termination of such policy of converted insurance for any reason other than by death or total permanent disability the director is hereby authorized to transfer and pay from the military or naval insurance appropriation to the United States Government life insurance fund a sum equal to the amount such lien or indebtedness exceeds the then cash surrender value. (June 7, 1924, c. 320, 43 Stat. 626.)

SEC. 308. Wherever yearly renewable term insurance or United States Government life (converted) insurance has heretofore lapsed for the nonpayment of premiums, and the insured has forwarded to the United States Veterans' Bureau, not later than the seventh day of the month following

the month for which the unpaid premium was due, an amount sufficient to reinstate the insurance under bureau regulations heretofore or hereafter issued, the director of the bureau is hereby authorized and directed to reinstate such insurance whenever it is shown to his satisfaction that the insured was at the time of the making of the remittance in the state of health required by bureau regulations. (July 2, 1926, c. 723, sec. 17, 44 Stat. 800.)

The following regulations of the Veterans' Administration were in force and effect on July 1, 1927, the effective date of the policy in this case:

Regulation No. 14, dated December 9, 1921, provides in part as follows:

1. *Due date of premiums.*—When any person insured under the provisions of the war risk insurance act leaves the active military or naval service the monthly premium which, had he remained in the service, would have been payable on the last day of the calendar month in which he was discharged, will be due and payable on the first day of the calendar month following the date of his discharge, and thereafter monthly premiums shall be due and payable on the first day of each calendar month.

2. *Premium pays for current month.*—The monthly premium so due and payable on the first day of the calendar month shall be deemed to carry such insurance for the then current calendar month. If any premium be not paid when due the insurance shall lapse and terminate as of that date except as hereinafter provided.

3. *Grace period.*—The premium due and payable on the first day of any calendar month, may, however, be paid thereafter at

any time within 31 days, excluding the first day of said month, which shall constitute a grace period for the payment of such premium. During such grace period the insurance shall remain in force but the unpaid premium shall be deducted from any settlement under the insurance on account of any claim arising during such grace period. If premium is not paid during the grace period, the effective date of lapse shall be the due date of the premium in default. * * *

Regulation No. 15, dated December 9, 1921, provides in part as follows:

1. Subject to the provisions of paragraph 3 of the present Government life insurance policy (quoted below) or a similar paragraph in any policy that may be issued hereafter under section 404 of the war risk insurance act or any amendment or supplement thereto, Government life (converted) insurance which has lapsed or may hereafter lapse, may be reinstated upon evidence of the insurability of the applicant satisfactory to the Director of the Veterans' Bureau and under the conditions stated in paragraphs 2, 3, 4, 5, and 6 hereof:

3. *Reinstatement.*—This policy, if it has not been surrendered for a cash surrender value, may be reinstated at any time after lapse upon evidence of the insurability of the insured satisfactory to the Veterans' Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, * * *.

2. Insurance may be reinstated: (a) Within three calendar months including the calendar month for which the unpaid premium was due, provided the applicant is in

as good health as he was at the due date of the premium in default; (b) after the expiration of the three calendar months mentioned in clause (a), provided the applicant is in good health.

* * * * *

6. The insurance shall not be deemed to be reinstated until satisfactory evidence of good health has been furnished and approved as required by this regulation and until all premiums in arrears have been paid with interest, * * *.

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